Helping hand

Barrett v Bem *sets an unusual precedent as Emily Exton explains*

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After a seven-year legal battle the will of Martin Lavin has recently been upheld by the court, in *Barrett v Bem* [2011], despite it having been signed by Mr Lavin's sister to whom he had left his entire estate (valued at £300,000).

In a decision he acknowledged that many would find 'alarming', and reversing his own earlier judgment, Vos J upheld as valid a will signed by the sole beneficiary on behalf of the testator. Giving his judgment without the benefit of any previous authority on such a situation, Vos J also found that there was nothing in legislation or any rule of public policy preventing a beneficiary from signing a will on behalf of a testator (in contrast to the position in relation to gifts made to witnesses to a will that are 'null and void'). He did, however, comment that legislation might be necessary if this 'plainly undesirable' situation arose regularly.

Vos J also acknowledged the need to be extra vigilant when considering the validity of a will in such circumstances. However, on the basis of all the evidence, he found that the will was valid. This was despite also finding that the evidence given by the three main witnesses in support of the will was 'completely unreliable'. When giving his judgment he was clear that it was the court's job to look for the truth of the situation, even if this was not initially apparent from the way the case had been presented by the lawyers.

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Facts of the case

Mr Lavin, who was unmarried, died in hospital of chest problems in January 2004. He was nearly 70. The will, which was purportedly made on the day of his death (the 2004 will), left everything to his sister, Anne Liston, who died in November of the same year. The claimant challenging the 2004 will was Mr Lavin's nephew Michael Barrett. The main defendant was Mrs Liston's daughter, Hanora, who (together with her children) was the residuary beneficiary of her mother's estate.

When first hearing the case back in 2009, Vos J had found that the 2004 will was not valid on the basis that the signature on it was not that of Mr Lavin. However, following the introduction of new evidence, the Court of Appeal remitted the case to Vos J for a retrial.

New evidence

The new evidence put before the Court of Appeal was a statement from one of the nurses witnessing the 2004 will. She said that when Mr Lavin had, from his hospital bed, attempted to sign the 2004 will, his hand had been shaking so much that either Mrs Liston or Ms Bem had held his hand so as to steady it. Her conclusion was that, despite his having been assisted when writing it, the signature on the 2004 will was indeed that of Mr Lavin.

This evidence was supported by further statements from Ms Bem and the other witnessing nurse. Despite having 'relentlessly denied' during the first trial that her mother had anything to do with the signing of the will, Ms Bem now said that her mother had assisted Mr Lavin with his signature because his hand had been shaking.

The second nurse's evidence was similar. However, there were various inconsistencies rendering her evidence 'unimpressive' and, in the event, Vos J felt unable to rely on either of the witnessing nurses. His impression was that they appeared

to be insisting on their recollection of the events in order to support Ms Bem's case. It emerged that both nurses had become very friendly with Mrs Liston and her daughter during their time visiting the testator while he was in hospital.

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The judge also found Ms Bem's evidence to be unreliable. Between the Court of Appeal hearing and the retrial it had emerged that Mr Lavin had in fact made an earlier will (the 2002 will) by which he had left his estate to other family members and nothing to Mrs Liston. Mr Barrett was given permission to amend his claim so as to seek to propound the 2002 will and an additional defendant was joined to represent the interests of all the beneficiaries under that will. It became clear to Vos J during the retrial that Ms Bem 'must have known' about the 2002 will and had concealed evidence of it. Further, in cross-examination, Ms Bem was significantly 'less certain' as to what had happened when the 2004 will was signed than she had been in her written evidence. Under cross-examination Ms Bem was prepared to concede that her mother's involvement might have gone further than assistance. She admitted that 'between the two of them [ie her mother and Mr Lavin] they signed the will'. Vos J felt that it was this statement that had a 'ring of truth' about it. He also felt that her initial recollection might have been influenced by a desire to defend her mother's actions.

Against that background, Vos J heard new expert evidence from both sides, which had been obtained following the Court of Appeal hearing. The issue that the experts were now asked to deal with was whether the signature on the 2004 will could have been a 'guided hand' signature, ie a signature that someone had assisted Mr Lavin to write. The conclusion of both experts was that the signature on the 2004 will could not have been a guided hand signature in that it was too fluent and did not display any of the normal characteristics of such a signature. In a joint report they stated that the fluency of the signature indicated that the pen used to sign the 2004 will 'was being held in a normal manner by the person writing the signature'. Given his ill health and position in the centre of a three foot hospital bed, hooked

up to a chest drain and wearing an oxygen mask, it was hard to see how this could have been Mr Lavin.

However, during cross examination of one of the experts, Mr Robert Radley, it emerged that he had not considered (because it had neverbeen suggested to him) the possibility that, instead of helping Mr Lavin to sign ('guiding his hand'), Mrs Liston had simply signed the 2004 will for him, at his direction. Taking all the evidence into account (including the late concession by Ms Bem), Vos J found this to be his 'irresistible conclusion'.

The law

Vos J dismissed the argument that s15 of the Wills Act 1837 (the Act) (which renders 'null and void' any gift made in a will to an executing witness) had any application to a person signing a will at the testator's direction.

Instead, he examined s9 of the Act, which provides that:

> No will shall be valid unless – (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and (b) it appears that the testator intended by his signature to give effect to the will; and (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either – (i) attests and signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of the other witness) but no form of attestation shall be necessary.

There was some debate during the retrial as to the precise effect of s9. However, Vos J regarded the law as being very clear: a testator may direct another to sign a will on their behalf and if such signature takes place in the presence of two witnesses, the will is 'signed' within s9(a) and there is no need for any subsequent acknowledgement of the signature. If, on the other hand the testator decides to sign themselves, assisted by some other person, the will is only validly signed if they have made 'some positive and discernable physical contribution' to the signing process.

What was more difficult was applying the inconsistent factual evidence to the law. Ms Bem's case was that her mother had merely assisted Mr Lavin to sign the 2004 will – to succeed it would need to be established that he had made some positive and discernable contribution to the signing process. However, Vos J concluded that this could not be the case. Any input from Mr Lavin would have revealed itself in the signature, which the experts agreed was far too fluent for him to have had any involvement in it.

The question then became whether Mr Lavin had directed someone (Mrs Liston) to sign for him. Despite the unreliability of the three witnesses, Vos J held that this was what must have happened. In his view, instead of stepping in to steady her brother's hand, Mrs Liston stepped in to sign the 2004 will for him. It was possible for a direction to sign to be implied by conduct, including negative conduct, so that the fact that Mr Lavin had allowed his sister to take the pen from him without any struggle was sufficient to imply that he had directed her to do it.

Vos J did allow, following the second rule in *Barry v Butlin* [1838], that there was a need for the court to be 'vigilant and jealous' in examining the evidence in support of a will where a party who wrote or prepared it also took benefit under it. The court should not pronounce in the will's favour unless the 'suspicion' arising from these circumstances had been removed and the deceased's intention clearly satisfied.

Conclusion for practitioners

Perhaps unusually, the judge found that the fact that key witnesses had lied about some things did not mean that they had lied about everything. He recognised that 'life is just more complicated than that'. His rather charitable interpretation was that the fear Ms Bem and the nurses had that Mrs Liston may have done something wrong had led to their reluctance to explain exactly what had happened. He referred to the evidence given by one of the nurses about the 'bad experience' she felt her witnessing of the will had been. All three witnesses appeared to feel that they had participated in some sort of wrongdoing and Vos J was prepared to explain away their lack of veracity on this basis.

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What mattered to Vos J was the ultimate truth of the situation. Despite some evidence that Mrs Liston had kept other family members away from Mr Lavin's hospital bed during the last few weeks of his life, no pressure or undue influence was found on the facts. All parties also agreed that Mr Lavin had gone through the will with Ms Bem and one of the nurses before the signing episode and had confirmed that he was happy with its contents. There was, in Vos J's view, no question that Mr Lavin had wanted to make a will and had wanted Mrs Liston to inherit.

Although it was obviously undesirable that beneficiaries should be able to execute a will in their own favour (and that legislation might be required if this was a common occurrence), Vos J was clear that the court should lean in favour of upholding a will if it could properly do so. Having scrutinised the matter carefully, he found that in this case the relevant 'suspicion' had been removed. He clearly felt that it would be a denial of justice if Mrs Liston did not inherit in circumstances where this had been Mr Lavin's wish. The 2004 will was pronounced and Mr Barrett's claim had failed. ■

Barrett v Bem & ors
[2011] WTLR 1117
Barry v Butlin
(1838) 2 Moo PC 480